



March 31, 2021

Sent via Email and FOIA Online

National Freedom of Information Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, D.C. 20460
(202) 566-1677
hq.foia@epa.gov

**Re: FOIA Request for Information Related to the Use, Production, Distribution,
and Disposal of Dechlorane Plus**

Dear Freedom of Information Officer:

Earthjustice submits this request (the “Request”) for records on behalf of Alaska Community Action on Toxics (“ACAT”) in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. Part 2. The purpose of the Request is to obtain records relating to the use, manufacture, import, distribution in commerce, and disposal of Dechlorane Plus (“DP”).

Your prompt response pursuant to the requirements of FOIA, 5 U.S.C. § 522(a)(6)(A), is appreciated.

DEFINITIONS

ACAT seeks the unredacted records listed below. “Unredacted” means that we are seeking full disclosure of all information in the requested record. If you determine that you cannot disclose all of the information contained in a particular record because certain information is covered by a FOIA disclosure exemption, we request a copy of the record with redactions of only the information that you have determined to be properly withheld and an explanation of the basis for your determination.

“Records” means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, calendar entries, meeting agendas, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. The term “records” as used above also includes any personal email messages, telephone voice mails or text messages, and internet ‘chat’ or social media messages, to the full extent that any such messages

fall within the definition of “agency records” subject to FOIA.¹ “Records” also includes any attachments to such documents or information.

The term “Dechlorane Plus” refers to the commercial mixture and polychlorinated flame retardant identified by the CAS number 13560-89-9. For the purposes of this FOIA, “Dechlorane Plus” includes its syn-isomer (CAS No. 135821-03-3) and anti-isomer (CAS No. 135821-74-8), as well as its shorthand “DP.” Certain other chemical names and formulas may also be used to refer to “Dechlorane Plus”; for the purposes of this FOIA, “Dechlorane Plus” also encompasses the following:

- 1,6,7,8,9,14,15,16,17,17,18,18-dodecachloropentacyclo-[12.2.1.16,9.02,13.05,10] octadeca-7,15-dien;
- 1,6,7,8,9,14,15,16,17,17,18,18-Dodecachloropentacyclo[12.2.1.16,9.02,13.05,10] octadeca-7,15-diene;
- C₁₈H₁₂Cl₁₂;
- Bis(hexachlorocyclopentadieno)cyclooctane;
- 1,2,3,4,7,8,9,10,13,13,14,14- Dodecachloro-1,4,4a,5,6,6a,7,10,10a,11,12,12a-dodechdro-1,4:7,10-dimethanodibenzo[a,e]cyclooctene;
- Dodecachlorododecahydrodimethanodibenzocyclooctene;
- Dechlorane Plus 25;
- Dech Plus;
- Dechlorane Plus 35;
- Dech Plus-2;
- Dechlorane Plus 515;
- DP-515;
- Dechlorane 605;
- Dechlorane A;
- DDC-CO;
- Escapeflam DK-15.

The use of the term “EPA staff” shall refer to any person employed by or working on behalf of EPA as a permanent employee, temporary employee, independent contractor, intern, fellow, or volunteer in any of EPA’s offices.

The use of the term “outside party” shall mean any person not employed by or working on behalf of EPA, as that term has been defined under FOIA.

¹ Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under FOIA. *See* U.S. Env’tl. Prot. Agency Info. Pol’y, Records Management Policy (2018) at 4, <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>. Therefore, a production of responsive records must include records using messaging services.

RECORDS REQUESTED

In accordance with FOIA, please provide us with the following records. Unless otherwise stated, the time period covered by these requests is January 1, 2013 until the date of this request.

1. All records of EPA or EPA staff, including but not limited to internal and external communications, reflecting or relating to the manufacture of Dechlorane Plus or Dechlorane Plus-containing products and articles, including but not limited to all communications and records exchanged with manufacturers such as Hooker Chemicals and Plastics Corporation (now Occidental Chemical Company, or OxyChem) in Niagara Falls, New York, and any other U.S. manufacturers.
2. All records of EPA or EPA staff, including but not limited to internal and external communications, reflecting or relating to the use, import, distribution in commerce, or disposal of Dechlorane Plus or Dechlorane Plus-containing products and articles.
3. All records of EPA or EPA staff reflecting or related to scientific reviews of Dechlorane Plus, whether undertaken by EPA staff or outside parties.
4. All records of EPA or EPA staff reflecting or related to the anticipated or proposed use of Dechlorane Plus as an alternative to EPA-regulated substances.
5. All Form Us submitted in 2020 under the TSCA Chemical Data Reporting rule for Dechlorane Plus.

We prefer to receive documents in electronic format. To the extent practicable, we seek electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format).

If you claim that any of the requested records are exempt from mandatory disclosure, we request that you:

1. Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
2. State the FOIA exemption you claim applies to each information request;
3. State with particularity the reason why such exemption is applicable to each information request;
4. Exercise your discretion to release such records notwithstanding the availability of a basis for withholding **or** examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information that is exempt from disclosure and provide us with a copy of each record with only the information exempt from disclosure redacted.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552, we request a waiver of fees that EPA would otherwise charge for searching and producing the records described above, because this Request satisfies both fee

waiver requirements. FOIA provides for fee waivers when: (1) “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government”; and (2) disclosure “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see* 40 C.F.R. § 2.107(l)(1).

I. THE REQUEST IS IN THE PUBLIC INTEREST

To determine whether a FOIA request meets the first prong of the fee waiver requirement, EPA analyzes four factors: (i) the subject of the request; (ii) the informative value of the information to be disclosed; (iii) the contribution to the public’s understanding of the subject; and (iv) the significance of the contribution to the public understanding. *See* 40 C.F.R. § 2.107(l)(2)(i)-(iv).

a. The Requested Records Concern the Operations or Activities of the Federal Government

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government.” 40 C.F.R. § 2.107(l)(2)(i). The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by a federal agency will meet this threshold.” *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers* at 27 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>. This threshold is met here not only because the records sought are possessed by the EPA or EPA staff but also because they relate to the federal government’s regulation of toxic chemical substances.

b. Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities

The second factor EPA considers in determining whether a fee waiver is appropriate is whether disclosure of the requested records is “likely to contribute to an understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii) (internal quotation marks omitted). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding” of government operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). Disclosure of the requested information will enable the public to better understand what information the federal government possesses regarding the use, manufacture, import, distribution, or disposal of Dechlorane Plus, which will in turn allow the public to understand whether an obligation to regulate DP has been triggered under a federal statute and what actions, if any, EPA has taken to investigate and/or regulate DP. This information will also enhance the ability of members of the public to prepare comments on, and participate in proceedings related to, future regulatory actions concerning DP or similar substances.

c. Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons

EPA next considers whether disclosure of the requested records will contribute to a broad “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request. *Id.* In evaluating a fee waiver request, EPA considers the “requester’s expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.*

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(l)(2)(iii). Dechlorane Plus is a persistent and bioaccumulative substance capable of long-range transport whose toxic effects are felt around the globe. It is marketed as a replacement for a newly regulated flame retardant and therefore may continue in widespread use. Information about the use, production, distribution, disposal, and toxicity of this chemical is of interest to wide swaths of the public who are exposed to Dechlorane Plus by virtue of both its continued use in commerce and its bioaccumulative properties. And information about the evidence possessed by EPA that bears on its decision whether or not to regulate DP is similarly of interest to the broad audience exposed to Dechlorane Plus.

ACAT has “the ability and intention to effectively convey [this] information to the public.” 40 C.F.R. § 2.107(l)(2)(iii). Alaska Community Action on Toxics is a nonprofit organization with a focus on protecting Alaskan communities from exposures to Dechlorane Plus and other persistent, bioaccumulative and toxic chemicals, which tend to accumulate in the Arctic. ACAT advocates at all levels of government—including the federal level—to reduce such exposures and associated harm to human health and the environment. It employs scientific experts who are well-positioned to understand how the requested records influence and support the federal government’s decisions to regulate in risk-based statutory frameworks. ACAT also has robust mechanisms in place to share information obtained from the requested records with the general public and other interested organizations, including quarterly newsletters, weekly email communications, and daily social media posts that ACAT shares with community of over 17,000 supporters and followers. It frequently comments on EPA dockets related to the regulation of, and science relevant to, similar toxic chemical substances, and it publishes news releases and investigative reports on chemicals of concern to Alaska communities like Dechlorane Plus. It intends to continue these activities to distribute the information it obtains from this FOIA request to interested audiences.

d. The Information Requested Will Contribute Significantly to Public Understanding of Government Operations or Activities

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all of the information contained therein, through EPA's website or internet searches. Indeed, it is not even possible for the public to ascertain the universe of information in EPA's possession that is responsive to the Request. The public's understanding of the government's responsibility to regulate the use, production, distribution, and disposal of Dechlorane Plus and the government's efficacy in protecting its citizens from hazardous chemicals like DP will "be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv).

II. ACAT HAS NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because ACAT does not have a commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(3). As federal courts have held, FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

ACAT is a 501(c)(3) nonprofit organization, and it does not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of ACAT's mission to inform and protect the public on matters of vital importance to the environment and public health.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

REQUESTS REGARDING RECORD DELIVERY

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply "must . . . indicate within the relevant time period the scope of documents [EPA] will produce." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information.

Please also produce the records on a rolling basis; at no point should EPA's search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

Katherine O'Brien
Earthjustice
P.O. Box 4743
Bozeman, MT 59772-4743
kobrien@earthjustice.org

If you find that this Request is unclear or if the responsive records are voluminous, please contact me at kobrien@earthjustice.org or (406) 586-9692, x1929, to discuss the proper scope of this Request. Thank you for your assistance.

Sincerely,

s/Katherine O'Brien
Katherine O'Brien
Staff Attorney
Earthjustice
P.O. Box 4743
Bozeman, MT 59772-4743
kobrien@earthjustice.org